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Nos. 00-653 and 00-744

IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

WISCONSIN BELL, INC., d/b/a
AMERITECH WISCONSIN, *et al.*,
Respondents.

ILLINOIS COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TCG MILWAUKEE, INC., AND TIME WARNER TELECOM OF WISCONSIN, L.P.

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Rule 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services, Inc., state as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Transmission Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, inc., is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

Pursuant to Rule 29.6, respondent TCG Milwaukee, Inc. states as follows:

TCG Milwaukee, Inc., is a wholly owned subsidiary of Teleport Communications Group Inc., which in turn is a wholly owned subsidiary of AT&T Corporation. No publicly held corporation owns 10% or more of AT&T Corporation's stock.

Pursuant to Rule 29.6, respondent Time Warner Communications of Milwaukee, L.P. states as follows:

Time Warner Communications of Milwaukee, L.P., now known as Time Warner Telecom of Wisconsin, L.P. is substantially owned by Time Warner Telecom, Inc. Time Warner Telecom, Inc. is an affiliate of Time Warner, Inc. Time

Warner, inc. is a publicly traded company on the New York Stock Exchange under the symbol "TWX".

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STATEMENT

Petitioners – the Public Service Commission of Wisconsin ("PSCW") and its individual commissioners in their official capacities and the Illinois Commerce Commission ("ICC") and its individual commissioners in their official capacities – ask the Court to determine whether the Eleventh Amendment bars federal courts from undertaking the review of state public utility commission actions that is expressly authorized by the Telecommunications Act of 1996[1] ("the Act" or "the 1996 Act"). Specifically, section 252(e)(6) of the Act provides that if state commissions agree to participate in the administration of a new federal scheme governing "interconnection" arrangements among competing local phone companies, their actions may be reviewed for compliance with the Act in federal district court. Petitioners did choose to participate, but then asserted an Eleventh Amendment defense to the ensuing federal lawsuits. The Seventh Circuit, in a ruling consistent with all comparable cases from other circuits, affirmed the rejection of the Eleventh Amendment immunity claim, relying both on waiver and on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

1. Statutory Scheme

The 1996 Act fundamentally altered the balance between federal and state authority in one area of telecommunications regulation. Seeking to introduce competition to local telephone service, Congress partially supplanted the existing system of exclusive state regulation, imposing a new set of federal standards and

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[1] Codified at 47 U.S.C. § 151 *et seq.*

procedures governing "interconnection" between incumbent local companies and potential competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

In the Act, Congress preempted all state laws erecting barriers to entry into telecommunications markets. § 253(a). Then it created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new entrants on an unbundled basis. § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. § 251(c)(4). In each case, Congress prescribed specific federal standards governing the rates that the respective carriers charge each other for these services. §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. 525 U.S. at 377-84 & n.5; § 201(b).

In the spirit of cooperative federalism, Congress also carved out a new, voluntary role for states. The Act requires incumbent local carriers to negotiate with new entrants to develop "interconnection agreements" specifying the terms of interconnection, access to network elements, and resale. § 251(c)(1). If the parties cannot arrive at a complete interconnection agreement through negotiation, however, the Act gives state utility

commissions the authority (if they choose to exercise it) to convene compulsory "arbitrations" at the request of a party to set terms by applying the substantive provisions of the Act and the FCC's regulations. § 252(b), (c). Whether negotiated or arbitrated, the final interconnection agreement must be submitted for review to determine whether it complies with the Act – with the state commissions reviewing the agreement if they choose to do so. § 252(e)(1).

The Act also provides that the local incumbent carrier may "prepare and file with a State commission a statement of the terms and conditions" that the incumbent "generally offers" to new entrants in the state. § 252(f)(1). In order to be approved by the state commission, these "Statements of Generally Available Terms" ("SGATs") must also be reviewed to ensure compliance with the Act. § 252(f)(2). Significantly, the submission or approval of an SGAT does "not relieve" a local incumbent carrier of "its duty to negotiate the terms and conditions" of interconnection pursuant to § 251. § 252(f)(5).

The Act does not require state commissions to implement the new federal scheme. If a state commission declines to exercise the authority offered to it by the Act, the FCC will assume those duties. § 252(e)(5). Whether carried out by the FCC or a state commission, however, final agency determinations regarding the terms of an interconnection agreement are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251" and § 252(e)(6). Federal jurisdiction is exclusive. § 252(e)(4)

("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section [252]"). Determinations of the FCC are reviewed by a federal court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1). *See* § 252(e)(6) (providing for "judicial review of the [FCC's] actions" when it assumes state commission's duties under 1996 Act).

2. The Illinois Litigation

a. *ICC Proceedings*. The ICC petitioners' request for review stems from the ICC's voluntary decision to participate in the Act's arbitration and approval process. MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services, Inc. ("MCI") entered into negotiations over an interconnection agreement with Illinois Bell Telephone Cos., d/b/a Ameritech Illinois ("Ameritech Illinois"). When no final agreement was reached voluntarily, the ICC agreed to arbitrate the disputes and ultimately approved an agreement. Dissatisfied with the ICC's actions, MCI filed suit in the federal court against Ameritech Illinois, the ICC, and the individual commissioners in their official capacities (collectively, the "ICC defendants"). Ameritech Illinois then filed a cross-claim challenging various other aspects of the ICC's determinations. The ICC defendants moved to dismiss these claims, asserting sovereign immunity under the Eleventh Amendment.

b. *District Court Proceedings*. The district court denied the motions to dismiss. ICC Pet. App. 74a-104a. It first ruled that "Congress made it expressly clear that participation in the [Act's] regulatory scheme requires review in federal court," and that "[b]y participating

voluntarily in the regulatory scheme, [the ICC defendants] have consented to suit." *Id.* at 89a-90a. The court also held that, even absent consent, "the doctrine of *Ex parte Young* allows these [claims] to proceed against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief." *Id.* at 102a.

c. *Initial Appellate Proceedings.* The ICC defendants took an interlocutory appeal and, in an opinion issued on February 10, 1999 and amended on June 23, 1999, the Seventh Circuit affirmed the Illinois district court's rejection of the Eleventh Amendment defense. *Id.* at 55a-73a.[2] It held that "by electing to assume responsibility for the arbitration contemplated by the Act, the defendants waived the State's immunity from suit in federal court," because the Act makes it sufficiently clear that such participation waives the state's immunity. *Id.* at 73a.

Soon thereafter, however, this Court issued its ruling in *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board*, 527 U.S. 666 (1999), addressing waiver of the Eleventh Amendment. The Seventh Circuit granted rehearing and asked for briefing on the effect of *College Savings.*

3. The Wisconsin Litigation

a. PSCW Proceedings. The Wisconsin portion of these consolidated cases actually involves three separate

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[2] The Illinois appeal originally included two other cases in which the plaintiffs were AT&T Communications and Ameritech Illinois. Those cases, however, were voluntarily dismissed. *See* ICC Pet. App. 57a nn.1-2.

federal cases. In the first, the PSCW had interpreted and enforced two previously approved interconnection agreements -- one between Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("Ameritech Wisconsin") and TCG Milwaukee, Inc. ("TCG" or "AT&T"), and the other between Ameritech Wisconsin and Time Warner Telecom of Wisconsin, L.P. ("Time Warner"). Ameritech Wisconsin disagreed with the PSCW's actions and brought suit in federal district court, naming as defendants TCG, Time Warner, and the PSCW and the individual commissioners in their official capacities (collectively, the "PSCW defendants").

The second case concerns the PSCW's determinations relating to an SGAT filed by Ameritech Wisconsin. *See* p. 3 *supra* (describing SGATs). The PSCW chose to review this filing, and several new entrants opposed aspects of the proposed SGAT in the proceedings before the PSCW. The PSCW adopted the positions of the new entrants, requiring Ameritech to modify its SGAT to comply with the Act. Ameritech Wisconsin sought review of that decision in a suit in the federal district court against the PSCW defendants. Three new entrants, AT&T, MCI, and US Xchange, sought to intervene in that action as defendants, explaining that they would be adversely affected by any decision overturning the PSCW's SGAT determination. The district court denied the intervention motions on the grounds that the new entrants' interests were adequately presented by the PSCW.

The third case involves the PSCW's determinations in arbitrating and approving a single interconnection agreement between Ameritech Wisconsin and MCI. The PSCW opted to approve a final Ameritech/MCI

interconnection agreement pursuant to § 252. Believing they were aggrieved by some of the PSCW's actions, Ameritech Wisconsin and MCI sued each other and the PSCW defendants in federal district court.

The district court consolidated the three suits, and the United States intervened. In each of the cases, the PSCW and the PSCW defendants filed motions to dismiss under the Eleventh Amendment.

b. *District Court Proceedings.* The district court reviewed all three motions together. PSCW Pet. App. 49a-76a. The court ruled that the PSCW defendants are immune from § 252(e)(6) suits under the Eleventh Amendment. First, the court explained that the Commerce Clause does not give Congress the power to abrogate Eleventh Amendment immunity. *Id.* at 58a-59a. Second, the court found that the PSCW had not waived its Eleventh Amendment immunity by choosing to help administer the Act. *Id.* at 59a-67a. Although the court found that the Act makes clear that a state that participates in the Act's administration will be subject to federal court jurisdiction, *id.* at 60a-61a, the court concluded that no proper waiver follows therefrom because state participation in the Act's administration is not voluntary. *Id.* at 65a-67a. Third, the court ruled that applying the doctrine of *Ex parte Young* to these suits would improperly supplant the specific judicial remedy created by Congress in § 252(e)(6). *Id.* at 68a-73a. Finally, in order to determine whether its Eleventh Amendment ruling required dismissal of these cases in their entirety, the court ordered the parties to brief whether the cases could continue without joinder of the PSCW defendants. *Id.* at 75a.

By the time the district court issued its second decision on whether the cases could proceed without the PSCW defendants, PSCW Pet. App. 77a-94a, the Seventh Circuit had issued its 1999 opinion in the Illinois case holding that a state waives the Eleventh Amendment by choosing to administer the Act. *See* ICC Pet. App. 55a-73a. In addition, this Court had issued its ruling in *College Savings*. Relying on the latter, the district court declined to alter its prior ruling, holding that *College Savings* had fatally undermined the Seventh Circuit's waiver analysis. PSCW Pet. App. 85a-86a. The district court also reiterated its finding that *Ex parte Young*, 209 U.S. 123 (1908), did not apply. PSCW Pet. App. 88a. Finally, having found that "the state commission is required for jurisdiction" under § 252(e)(6), the court held that the suits could not continue in the PSCW defendants' absence. PSCW Pet. App. 89a-93a. The court accordingly dismissed all of the suits for lack of subject-matter jurisdiction. *Id.* at 93a.

4. The Ruling Below

The Illinois appeal, on rehearing, was consolidated with respondents' initial appeals in the Wisconsin case. On July 24, 2000, the Seventh Circuit issued a decision affirming the Illinois court's rejection of Eleventh Amendment immunity and reversing the dismissal of the Wisconsin cases. PSCW Pet. App. 48a. First, it held that, while there are "boundaries for congressional attempts to obtain waivers from states," the waivers obtained from states that choose to participate in the Act's regulatory scheme were proper. *Id.* at 31a. It explained that Congress clearly "intended to provide for federal court review of any regulatory determination made under" § 252, *id.* at 33a, and that states that voluntarily accept

Congress's invitation to be a "'deputized' federal regulator" under § 252 cannot subsequently claim that their authority to regulate originates in "their own sovereign authority." *Id.* at 37a.

In so doing, the Seventh Circuit rejected the PSCW and ICC petitioners' argument that this Court, in *College Savings*, invalidated all "so-called 'constructive' or 'implied' waivers." *Id.* at 30a. It explained that "[t]he Court in *College Savings* limited its abandonment of 'constructive' or 'implied' waivers to the 'ill conceived' 'constructive-waiver experiment of *Parden* [*v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184 (1964)],'" where the Court had held that a state waived its immunity by merely engaging in activity that is regulated by Congress. *Id.* The Seventh Circuit went on to illustrate the "fundamentally different" waivers that, under *College Savings*, "Congress may still obtain from the states." *Id.* at 30a-31a (discussing states' waiver of immunity by entering into an interstate compact that required Congress's approval pursuant to the Compact Clause in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and states' waiver of immunity once they have accepted federal funds allocated under Congress's Spending Power in *South Dakota v. Dole*, 483 U.S. 203 (1987)). These types of waiver illustrated that when petitioners accepted the gratuity of participating in a federal regulatory scheme, they necessarily caused a valid waiver of Eleventh Amendment immunity.

Second, the Seventh Circuit held that, "[a]s an independent basis for decision . . . the Eleventh Amendment does not bar the carriers from pursuing" *Ex parte Young* actions against the individual members of the state commissions in their official capacities. PSCW Pet.

App. 40a. The Court agreed with the two other circuits that have ruled on the issue that suits brought pursuant to § 252(e)(6) "are 'straightforward' *Ex parte Young* cases." *Id.* at 41a (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d 929, 934 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-598); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000)). It rejected petitioners' argument that a suit challenging a state commission's § 252(e) determination could not be brought under *Ex parte Young* because the relief sought would be retrospective in nature. The court explained that "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. at 42a.

The court also rejected petitioners' attempt to liken the present case to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). The court explained that, unlike the Indian Gaming Regulatory Act in *Seminole Tribe*, the 1996 Act does not create a "'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." *Id.* at 42a-43a. The court also explained that the "special sovereignty interests" that a state has in title over land and water within its borders and that were at stake in *Coeur d'Alene* "cannot be equated" with states' "interests in the regulation of telecommunication providers." *Id.* at 46a. Any independent interests that the states may have had in regulating interconnection agreements between carriers

and SGATs were validly extinguished by Congress with the 1996 Act. *Id.* at 46a-47a.

5. Relevant Events Following Appeal

Shortly after the Seventh Circuit issued its opinion and entered judgment against the two state commissions on July 24, 2000, the ICC defendants moved to stay the court's mandate pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending the filing of a petition for a writ of certiorari in the Supreme Court. The Seventh Circuit denied the motion. Thus, the mandate issued, and jurisdiction was returned to the district court.

On October 10, 2000, MCI and Ameritech moved the district court for the Northern District of Illinois to dismiss voluntarily all of their claims because the interconnection agreement at issue was going to expire. Their motion was granted. *See* ICC Pet. at 8. In a motion filed with the Seventh Circuit on October 23, 2000, the ICC defendants moved to have the court of appeals' opinion recalled and the judgment vacated because of the district court's dismissal order. *See id.* That motion was denied in a summary order on November 15, 2000.

REASONS FOR DENYING THE PETITIONS

Review should be denied in these cases. To begin with, the Illinois case is moot. Moreover, there are no conflicts among the circuits as to any of the questions presented, and petitioners identify no independent reason justifying this Court's review.

Although petitioners place the greatest emphasis on the waiver issue, the Seventh Circuit's ruling on the *Ex*

parte Young question is plainly correct, clearly not worthy of review, and sufficient on its own to justify the review of state commission actions that petitioners seek to block. Three circuits have now held that a lawsuit challenging approval of an interconnection agreement is properly brought against state public utility commissioners in federal court pursuant to *Ex parte Young* because (1) such a suit seeks prospective relief from an ongoing violation of federal law, and (2) nothing in the Act precludes reliance on *Ex parte Young*. There is no circuit split on this issue, and the arguments against application of *Ex parte Young* offered in the petitions suggest no reason to second-guess the prevailing consensus.

Because this case could properly be brought under *Ex parte Young*, it follows that a decision by the Court on the first Question Presented in both petitions – whether petitioners validly waived the Eleventh Amendment – will have no practical impact on any party. At the most, a ruling that petitioners did not waive the Eleventh Amendment would require amendment of the caption of these cases to limit the defendants to the commissioners in their official capacity. Given the Court's oft-expressed reluctance to review abstract issues of law that will have little or no practical importance in the case at hand, that fact alone would be a sufficient basis to deny review on the waiver issue. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In any event, even on its own terms, the waiver issue does not warrant review. The Seventh Circuit's finding of waiver conflicts with no decision in any other circuit. Nor is it inconsistent with *College Savings*. To the contrary, in *College Savings*, the Court recognized that it is well within Congress's power to condition receipt of a benefit

on a state's waiver of the Eleventh Amendment. That analysis applies here, where Congress largely preempted state regulation of an area of interstate commerce and then provided that a waiver of the Eleventh Amendment would result if state regulators deliberately and voluntarily accepted the benefit of participating in the new federal regulatory scheme.

Finally, the additional Questions Presented in the Wisconsin petition add little to the already weak argument for Supreme Court review in this case. The waiver argument fares no better when transformed into a Tenth Amendment "coercion" claim. In fact, this Court's Tenth Amendment cases strongly support Congress's power to regulate an area of interstate commerce and offer the states a chance to participate only on the terms set by Congress. The remaining question in the Wisconsin petition appears to be more or less a reiteration of unpersuasive points already made in the earlier discussion of waiver.

I. The Illinois Case Is Moot.

The case involving the ICC petitioners is moot because the case has been dismissed by the district court. The carriers – the aggrieved parties – voluntarily filed a joint motion requesting a dismissal of the case on mootness grounds. The district court granted the motion. *See* ICC Pet. at 8. In a subsequent brief before the Seventh Circuit, the ICC defendants agreed with the carriers and the district court that the case was moot. *See id.*

The Court has taught that a "case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal

quotation and citation omitted); *see also City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1390 (2000); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70-71 (1983); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Since there is no longer a live controversy with regard to the MCI-Ameritech agreement approved by the ICC, the ICC petitioners' current attempt to seek review of a strictly jurisdictional question from this Court should be summarily rejected. *See City of Erie*, 120 S. Ct. at 1390 ("The underlying concern [of the mootness doctrine] is that, when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated,' then it becomes impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).[3]

II. The Seventh Circuit's Reliance on *Ex parte Young* Does Not Warrant Review.

The PSCW petitioners' arguments for review by this Court are also severely undermined by their inability to make a plausible case for review of the *Ex parte Young* issue set forth in the fourth Question Presented. Three circuits have now held that a case like this one is a "straightforward *Ex parte Young* case." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000),

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[3] The Seventh Circuit has already addressed whether the mooting of the Illinois case requires that the ruling below be vacated. *See* supra p. 10. It summarily rejected the ICC petitioners' motion to vacate, presumably because the same opinion also applies to the Wisconsin cases.

cert. denied, 121 S. Ct. 54 (2000); *see* PSCW Pet. App. 41a (Seventh Circuit case below); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[4] There is no reason to question that consensus position.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials, seeking prospective relief from ongoing violations of federal law, is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting). These standards are plainly met here. Indeed, this Court has often recognized that *Ex parte Young*

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[4] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to § 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *US West Communications, Inc,v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

provides a proper vehicle for federal-court review of state commission decisions. *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (referring to the "many cases prior to and following *Ex parte Young* . . . in which this Court has granted . . . relief"); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908).

Thus, petitioners are left with the option of trying to make this case look like *Seminole Tribe*. In fact, however, there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it explicitly prohibited a court from enforcing its own order with contempt sanctions, as it normally would have the power to do. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available

under IGRA and an *Ex parte Young* action, where the typical remedy is an injunction and contempt sanctions are available.

Here, as the Seventh Circuit held, there is nothing in § 252 that would limit federal court review in a remotely comparable manner. *See* PSCW Pet. App. 42a-43a. In fact, allowing *Ex parte Young* suits to proceed pursuant to § 252(e) only realizes Congress's intention to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

Seminole Tribe also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term

"state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. § 153(41). Contrary to petitioners' claims, PSCW Pet. at 28-29; ICC Pet. at 20-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

The PSCW petitioners go on to argue that *Ex parte Young* does not apply where, as here, the state courts could provide an alternative forum. PSCW Pet. at 29-30. But the state courts are an alternative forum in nearly all cases where *Ex parte Young* authorizes a suit in federal court to vindicate federal law – including the paradigmatic case of a suit under 42 U.S.C. § 1983 seeking an injunction to enforce federal rights.[5/]

The ICC petitioners argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 23-27. But that argument is equally misplaced. It completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the

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[5] Moreover, the Act provides that, at least as to a commission decision approving or rejecting an interconnection agreement, review in federal court is the exclusive remedy. § 252(e)(4).

supremacy of federal statutory and constitutional law"); *Seminole Tribe*, 517 U.S. at 73-74 (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine.

Finally, it is baseless for the ICC petitioners to claim that the relief sought here is retrospective, and thus unavailable under *Ex parte Young*. ICC Pet. at 28-29. As the Seventh Circuit correctly held:

> The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine.

PSCW Pet. App. 42a (citation omitted).

Given the unanimity among the circuits on the application of *Ex parte Young* in actions under section 252, and the fact that the Court has twice denied review on this precise question during this Term,[6] there is no reason whatsoever to second-guess the Seventh Circuit's ruling on this issue. That, in turn, is by itself a sufficient reason to deny review on the separate question whether petitioners

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[6] *Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (cert. denied Oct. 2, 2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (cert. denied Oct. 30, 2000).

waived the Eleventh Amendment. Where a case can be decided on a ground that is relatively simple and non-controversial, this Court's practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, if they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").[7] *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 4.4, 172-73 (7th ed., 1993) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (cases cited omitted). The Court should follow the same practice here – denying review of issues that would remain purely "academic" unless and until the Court also overturned the Seventh Circuit's *Ex parte Young* ruling.

III. The Waiver Issue Does Not Warrant Review.

Even if the issue were squarely presented here in a non-abstract way, there would be no persuasive reason for the Court to review the Seventh Circuit's ruling that state commissions waive immunity when they undertake to review

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[7] In *The Monrosa*, the Court granted review to address the enforceability of a forum selection clause in a bill of lading. Having determined, however, that the case could be resolved on the alternative ground that the clause at issue did not cover actions *in rem*, the Court declined to address the enforceability issue. 359 U.S. at 184.

or apply interconnection agreements under the Act. Here again, although petitioners claim that the federal courts are in disarray on this question, the Tenth Circuit – the only other court of appeals to have addressed the question – is in agreement with the Seventh Circuit. *MCI Telecommunications Corp.*, 216 F.3d at 936-39.[8] Moreover, both circuits have faithfully followed this Court's teachings in *College Savings*.[9]

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[8] Petitioners cite three rulings of courts of appeals in support of their claim of disarray on this issue. PSCW Pet. at 17-18; ICC Pet. at 18-19. In the first, *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), the only reference to the Eleventh Amendment is pure dicta in a footnote. *See id.* at 922 n.6. The state commission, as a corporate entity, was not even a defendant in *Strand* and the Sixth Circuit determined that the waiver issue was not presented because *Ex parte Young* applied.

The second case cited by petitioners, *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999), *petition for cert. filed*, 69 U.S.L.W. 3296 (U.S. Oct. 16, 2000) (No. 00-610), did not concern the 1996 Act. Moreover, plaintiff-appellants in *Burnette* relied on *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), an opinion that was overruled by *College Savings* shortly after plaintiff-appellants there presented oral argument. 192 F.3d at 60. Finally, petitioners cite *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). That case also did not involve the 1996 Act and dealt with the question of the states' authority to *abrogate* Eleventh Amendment immunity under the Fourteenth Amendment.

[9] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. See, e.g., *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or.

In *College Savings*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. at 666, 679. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court created an irrebuttable presumption that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally

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1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

Here, the Seventh Circuit followed *College Savings* in holding that the PSCW and ICC defendants voluntarily waived their sovereign immunity when they decided to arbitrate or approve the disputes at the core of this case. PSCW Pet. App. 28a-32a. Pursuant to the teachings in *College Savings*, the court "[could] not accept the commissions' argument that all constructive waivers are now foreclosed." *Id.* at 30a-31a (discussing *Petty* and *Dole*). Instead, the Seventh Circuit understood "the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states" by doing away with the *Parden*-styled "forced waiver" in which a "state is threatened with the sanction of waiving its immunity if it

engages in a regulated enterprise." *Id.* at 31a (citing *College Savings*, 527 U.S. at 683, 690).

This case, by contrast, involves a new federal regulatory program in which states may voluntarily choose to participate. Because Congress has set terms for that participation, regulation of carrier-to-carrier agreements concerning local interconnection "is no longer an 'otherwise permissible activity' for states." PSCW Pet. App. 40a. The states "are free to accept or reject the terms Congress has offered," *id.*, but if they accept the "regulatory power offered by Congress, [they] must accept the condition that was attached" – "submi[ssion] to federal jurisdiction to review their actions." *Id.* at 38a.[10]

Petitioners' primary argument for the claim that they should be allowed to accept the benefit of participation in the section 252 process while evading the federal judicial review that goes with it relates to the scope of preemption of state law by the Act. Petitioners assert that Congress did not and could not preempt "*all* state jurisdiction over local telecommunications competition as a necessary predicate to the gratuity," because the Act does not contain an express statement making "such a broad preemption." PSCW Pet. at 15; *see also* ICC Pet. at 17-18. They go on to assert that the Seventh and Tenth Circuits' holdings are "flawed" because they "rest[] on the bare assertion that, '[a]lthough it did not do so, Congress *could have* preempted all regulation of local

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[10] The FCC has made clear that it stands ready to step in if a state commission chooses not to participate in the regulatory scheme, including at the stage of enforcing interconnection agreements. *See In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (June 14, 2000).

phone service'." PSCW Pet. at 15 (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d at 938).[11] They conclude that the real issue here is "whether a state's existing, un-preempted *police power presence* in local telecommunications competition could lead to the waiver of Eleventh Amendment immunity." *Id.* at 17 (emphasis added).

This argument is utterly unpersuasive. It is true that the Act does not completely foreclose the operation of state law in the area of telecommunications addressed by sections 251 and 252. State laws may continue to be applied to the extent they supplement and are consistent with the Act. §§ 252(e)(3), 253. But it is not the application of state law – *i.e.*, the exercise of police power – that triggers the waiver. The waiver occurs if a state chooses to apply *federal* standards in a *federally* prescribed arbitration process,

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[11] The ICC petitioners make the additional argument that "[t]he Act does not inform states with the clarity required by this Court that performing the regulatory responsibilities given to them will result in waiver of their sovereign immunity." ICC Pet. at 19. Again, they rely on a completely unrelated case to support this argument. *Id.* (citing *United States v. Nordic Village*, 503 U.S. 30 (1992)). Moreover, the Seventh Circuit carefully examined this contention and concluded that Congress had "expressed unmistakably" its insistence on federal court review of the actions of states choosing to participate under the Act. PSCW Pet. App. 34a.

The ICC petitioners also argue that Congress may not offer the states an invitation to waive immunity in return for a "gratuity" in a statute premised on the Commerce Clause. ICC Pet. at 11-14. Here again, the Seventh Circuit addressed this argument persuasively. PSCW Pet. App. 35a-36a.

replacing the FCC in that role.[12]

Certainly there can be no doubt that Congress has imposed detailed federal standards and procedure governing the area of local interconnection. As the Court noted in *AT&T Corp.*:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

525 U.S. at 378 n.6. For that reason, the Court added, "there is no doubt . . . that if federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*[13]

Given that reality, it would make no sense to hold that petitioners' conditional waiver of the Eleventh Amendment was invalid because Congress did not preempt state law in a

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[12] The PSCW petitioners also include a third Question Presented and a corresponding section of the Petition, PSCW Pet. at 23-27, arguing that the Act does not evince a congressional intent to preempt all state jurisdiction over local interconnection. This argument adds little or nothing to petitioners' flawed discussion of waiver.

[13] The local competition provisions of the Act concern only one narrow (albeit important) slice of regulation: the terms and conditions of interconnection *between competing phone companies*. *See Puerto Rico Tel. Co. v. Telecommunication Regulatory Board of Puerto Rico*, 189 F.3d 1, 8, 12-13 (1st Cir. 1999). States, therefore, retain the regulatory powers over local telephone service that they may choose to exercise outside the sphere of interconnection agreements, including any power under state law to regulate the terms and conditions under which telephone companies offer local service to subscribers. *See* § 253(b); *Puerto Rico Tel.*, 189 F.3d at 12.

fully comprehensive fashion. Congress created a new federal program that "federalized" much of a given area of telecommunications regulation. A state's participation in that program can validly be conditioned on acceptance of federal judicial review, even if some aspects of applicable state law remain operative.

IV. The Wisconsin Petitioners' Tenth Amendment Argument Does Not Warrant Review.

The PSCW petitioners go on to claim that the Act violates the Tenth Amendment because it "coerces," and does "not merely encourage," states to waive their constitutionally protected sovereign immunity. PSCW Pet. at 19; *see also* ICC Pet. at 13-14 (Congress has "demand[ed], as a condition for state participation in the federal scheme, a waiver of the state's immunity"). This coercion is said to arise because a state's decision not to participate in the arbitration and approval of § 252 interconnection agreement would, as a practical matter, leave the state with no ability to apply its state law and policies to the same matter. PSCW Pet. at 20-22. Petitioners rely on *FERC v. Mississippi*, 456 U.S. 742 (1982), as authority for the proposition that this level of "coercion" violates the Tenth Amendment. PSCW Pet. at 20.

In fact, however, *FERC v. Mississippi* and the related Tenth Amendment rulings of this Court strongly support what Congress did in the Act. They stand for the proposition that Congress may impose federal regulation on an area of interstate commerce previously regulated by the states, and then pursue "cooperative federalism" by giving the states the choice of regulating consistent with federal requirements or not at all.

Thus, the Court in *FERC v. Mississippi* held that the law at issue did not compel "the States to enact a legislative program," but "simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals." *FERC*, 456 U.S. at 765. The law was held to be a proper exercise of Congress' power to "pre-empt the States entirely in the regulation of private utilities." *Id.* at 764.

Here, as in *FERC*, the Act does not "commandeer" states to administer federal law. "To the contrary, [the Act] offers the States a vehicle for remaining active in an area of overriding concern," although in a more limited capacity. *Id.* at 766. Petitioners, in turn, *voluntarily* accepted Congress's invitation to participate when they chose to entertain the disputes, arbitrate negotiations, directed the parties to prepare agreements and statements, and approved the submitted agreements and statements in accordance with the Act. PSCW Pet. at 3-4. They certainly were not coerced with the threat of sanction or being barred from engaging in an "otherwise lawful activity." Petitioners' participation in the administration of the Act was a "gratuity" that Congress was free to grant (or withhold) at its pleasure.

The Tenth Circuit, the only other court of appeals to have entered judgment on this question, is in lock-step with the Seventh Circuit on this question. *See MCI Telecommunications Corp.*, 216 F.3d at 938 ("[The Act] invites states to participate in the federal government's regulation of local telephone service. Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity. . . . Thus, § 252 puts [the states] on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252.").

In sum, petitioners have not identified a conflict in the circuits on any of the questions presented, and have given no other reason justifying this Court's review.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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